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Chair of the Trade Policy Staff Committee
Office of the United States Trade Representative
1724 F Street, NW
Washington, DC 20508

Re: Comments of the International Intellectual Property Alliance (IIPA) in response to USTR’s Request for Comments on Negotiating Objectives for a United States-Republic of Kenya Trade Agreement, 85 Fed. Reg. 16450 (March 23, 2020)

To the Trade Policy Staff Committee:

I. INTRODUCTION

The International Intellectual Property Alliance (IIPA) appreciates this opportunity to comment on the copyright and related issues that are critically important to our members as part of the U.S. Government’s negotiations with Kenya for a U.S.-Kenya Free Trade Agreement (Agreement). This filing is made in response to the above-captioned Federal Register Notice (FRN), which requested comments “with regard to objectives identified in section 102 of the Bipartisan Congressional Trade Priorities and Accountability Act of 2015 (19 U.S.C. 4201).” The FRN specifically invites comments on a non-exhaustive list of issues, including “[r]elevant barriers to trade in goods and services between the United States and Kenya” and “[o]ther measures or practices, including those of third-country entities, which undermine fair market opportunities for U.S. businesses, workers, farmers, and ranchers.” IIPA’s comments focus primarily on the objectives for intellectual property rights and digital trade.

IIPA is a private sector coalition, formed in 1984, of trade associations representing U.S. copyright-based industries working to improve copyright protection and enforcement abroad and to open foreign markets closed by piracy and other market access barriers. Members of the IIPA include: Association of American Publishers (www.publishers.org), Entertainment Software Association (www.theesa.com), Independent Film & Television Alliance (www.ifta-online.org), Motion Picture Association (www.motionpictures.org), and Recording Industry Association of America (www.riaa.com).

Collectively, IIPA’s five member associations represent over 3,200 U.S. companies producing and distributing copyrightable content. The materials produced and distributed by IIPA member companies include: entertainment software (including interactive video games for

consoles, handheld devices, personal computers and the Internet) and educational software; motion pictures, television programming, DVDs and home video and digital representations of audiovisual works; music recorded in all formats (from digital files to CDs and vinyl) for streaming and other online services as well as broadcasting, public performance and synchronization in audiovisual materials; and fiction and non-fiction books, educational, instructional and assessment materials, and professional and scholarly journals, databases and software in all formats. For all of the IIPA member-companies, strong copyright laws and enforcement regimes, in all markets around the world, are essential to their success in order to make these materials accessible to consumers.

In December 2018, IIPA released the latest update of its comprehensive economic report, *Copyright Industries in the U.S. Economy: The 2018 Report*, prepared by Stephen E. Siwek of Economists Inc. (2018 Report). According to the 2018 Report, the “core” copyright industries in the United States generated over \$1.3 trillion of economic output in 2017, accounting for 6.85% of the entire economy, and, employed approximately 5.7 million workers in 2017, accounting for 3.85% of the entire U.S. workforce and 4.54% of total private employment in the U.S. The jobs created by these industries are well-paying jobs; for example, copyright industry workers earn on average 39% higher wages than other U.S. workers. In addition, according to the 2018 Report, the core copyright industries outpaced the U.S. economy, growing at an aggregate annual rate of 5.23% between 2014 and 2017, while the U.S. economy as a whole grew by 2.21%. When factoring in other industries that contribute to the copyright economy (which together comprise what the 2018 Report calls the “total” copyright industries), the numbers are even more compelling, as detailed in the 2018 Report.

Additionally, the 2018 Report highlights the positive contribution of selected copyright sectors to the U.S. overall trade balance. In 2017, these sectors contributed \$191.2 billion in foreign sales and exports, exceeding that of many other industry sectors, including chemicals, aerospace products and parts, agricultural products, and pharmaceuticals and medicines.¹

Studies such as the 2018 Report amply demonstrate the contribution of creators, producers, and the copyright-based industries that support them, to the American economy. They also highlight what is at stake if those creators, producers and industries have to face the additional hurdles and costs associated with obstacles such as copyright piracy and discriminatory market

¹See Stephen E. Siwek, *Copyright Industries in the U.S. Economy: The 2018 Report* (December 6, 2018) available at <https://iipa.org/reports/copyright-industries-us-economy/>. Core copyright industries are those whose primary purpose is to create, produce, distribute, or exhibit copyright materials. The link between copyright protection and economic growth is well documented by the World Intellectual Property Organization (WIPO) in its report, *2014 WIPO Studies on the Economic Contribution of the Copyright Industries: Overview*, available at http://www.wipo.int/export/sites/www/copyright/en/performance/pdf/economic_contribution_analysis_2014.pdf, and the WIPO website now provides links to 49 country studies employing virtually the same agreed-upon methodology, see <http://www.wipo.int/copyright/en/performance/>. These studies provide the economic underpinnings for efforts to reform copyright laws, improve enforcement, and lower market access barriers. The Motion Picture Association has commissioned a series of “Economic Contribution of the Film and Television Industries” studies. Some recent examples of these studies include: South Korea (2019); China (2019); Japan (2019); India (2018); and Brazil (2016). See also UK Music’s *The Economic Contribution of the Core UK Music Industry* (2013) available at http://www.ukmusic.org/assets/general/The_Economic_Contribution_of_the_Core_UK_Music_Industry_WEB_Version.pdf, and PWC’s *Economic contribution of the New Zealand music industry, 2012 and 2013* (2014), available at <http://www.wecreate.org.nz/wp-content/uploads/2014/07/PWC-Music.pdf>.

barriers. This is why trade agreements that obligate American trading partners with high levels of copyright protection and enforcement, and which work to defeat market access barriers, are essential to the further successes of the copyright industries.

II. NEGOTIATING OBJECTIVES, RELEVANT BARRIERS, OTHER PRACTICES

Kenya's Attorney General Kihara Kariuki recently highlighted the creative industries' contribution to Kenya's economy, citing a study estimating the contribution to be 5.3% of GDP and stating, "The protection of the copyrights will essentially put money into the pockets of authors, producers and all creators."² Yet Kenya's copyright legal and enforcement frameworks remain deficient, and piracy, particularly online, remains a significant barrier for the creative industries in Kenya. In 2019, Kenya enacted an amendment to its Copyright Act intended to address some of the challenges of the digital age. While the new law provides rights holders with some important protections, there are concerns regarding the scope of those protections, including whether they are consistent with international standards and best practices.

These negotiations should be a catalyst for the Government of Kenya to take the necessary steps to modernize Kenya's copyright legal and enforcement regimes, and improve its marketplace for legitimate digital trade in copyright protected materials. IIPA is hopeful that the U.S.-Kenya negotiations will both build on the positive achievements of the U.S.-Mexico-Canada Agreement (USMCA), and depart from certain provisions that are problematic, as discussed below. If this is accomplished, the Agreement can set the bar for a high-level agreement that is truly built for the digital age, including much-needed copyright protections and enforcement provisions. This would both serve as a model for future U.S. agreements in the region, while also improving the market in Kenya for the continued growth of the American and Kenyan copyright industries.

A. *Intellectual Property Objectives*

Intellectual property regimes, specifically copyright laws and practices, encourage the creation of new creative works, and provide incentives for disseminating these works through legitimate channels on commercial terms as broadly as possible. Good copyright laws also help to promote investments needed to renew and preserve the creative process and cultural enterprise, and also promote technological advances used to produce and distribute copyrighted materials. As Kenya's Attorney General recognized, Kenya should incentivize its own creative industries and foster economic growth and stability by improving the effectiveness of its intellectual property law and enforcement mechanisms. In support of such efforts, at a minimum, any trade agreement with Kenya should reflect the current global consensus on minimum standards of copyright protection in the digital era. Therefore, U.S. objectives on copyright in its negotiations with Kenya should include ensuring:

- a **high standard of protection for copyright**, including **obligations to fully implement the WIPO Internet Treaties** (the "Treaties"), **effective legal protections for technological measures and rights management information**

²See Anyango Otieno, "AG: Kenya to ratify copyright protection, information laws", June 11, 2019, [The Standard](https://www.standardmedia.co.ke/article/2001329381/how-copyright-creative-works-can-boost-gdp), <https://www.standardmedia.co.ke/article/2001329381/how-copyright-creative-works-can-boost-gdp>.

that are used by copyright owners to control access to and copying of their works, a **proper duration of protection** for works and sound recordings, and **freedom of contract** for transfers of exclusive rights;

- comprehensive obligations for **copyright enforcement**, including **criminal penalties, civil remedies, border enforcement measures, anti-camcording enforcement, presumption of ownership, enforcement measures to address online infringement** that include **secondary liability principles** to provide legal incentives for cooperation between service providers and rights holders, and **liability for aiding and abetting** infringing activities; and
- effective, transparent and accountable **collective management** of copyrights consistent with international standards and best practices to ensure rights holders are able to control the use of their rights.

Improved protections will provide American and other creators and producers with stronger incentives to invest in Kenya's creative industries, spurring economic growth and tax revenues, and enabling creators and producers to continue offering content to Kenya's consumers in the latest formats.

1. High Standard of Copyright Protection

Like the USMCA, the Agreement should include obligations to **fully implement the Treaties**, which set the global minimum standards for providing copyright holders with the full panoply of exclusive rights in the digital networked environment. While Kenya has announced its intention to accede to the Treaties, there has been no stated timeframe for accession.³ The Agreement should require Kenya to accede to and fully implement the Treaties.

While the recently passed copyright law amendment appears to provide many of the exclusive rights required by the Treaties, unfortunately there is uncertainty regarding the nature and scope of these protections. For example, contrary to the requirements of the WIPO Performances and Phonograms Treaty (WPPT), the law does not expressly include public performance as part of the right of communication to the public, and it does not expressly define the making available right. The Government of Kenya should revise the law to ensure that the exclusive rights of public performance and making available are fully and explicitly protected, consistent with the WPPT. Also in accordance with the WPPT, the definition of "publication" in Kenya's law should be revised to clarify that protections for exclusive rights apply to all sound recordings, including those "born digital" that are not released in physical formats.

Kenya's copyright law creates uncertainty regarding the rights of communication to the public and broadcasting regarding sound recordings and audiovisual works. The law protects these rights as exclusive rights, but Article 30A provides only a right of remuneration for the

³Kenya's Attorney General recently affirmed that the government "is considering ratification of the WIPO Internet Treaties." See Anyango Otieno, "AG: Kenya to ratify copyright protection, information laws", June 11, 2019, The Standard, <https://www.standardmedia.co.ke/article/2001329381/how-copyright-creative-works-can-boost-gdp>.

communication to the public and broadcasting of sound recordings and audiovisual works. This ambiguity should be resolved to clarify that these important rights are exclusive, in accordance with international standards. In addition, as discussed below, the law should also clarify that exclusive rights should not be subject to management by Collective Management Organizations (CMOs), unless rights holders expressly authorize a CMO to manage their rights on a voluntary basis and, in that case, only in accordance with the terms of that authorization.

The Agreement should require proper protections for **technological protection measures (TPMs)**, which are critical for enabling business models that foster many of the innovative products and services available online. A major reason why so much legitimate creative content is now available to consumers, and in so many formats and on so many platforms, is because of the widespread use of TPMs by content producers and (licensed) services. These TPMs ensure that only authorized users and consumers have access to copyrighted content. To protect these innovative business models, the Agreement should require the protection of TPMs, confine exceptions to such protections to those provided in U.S. law, and provide an explicit requirement for periodic review of additional exceptions. The USMCA provision on TPMs is very strong, but unfortunately does not include the review requirement. This review requirement was included in the Korea-U.S. FTA and is a key aspect of U.S. law that ensures that any additional exceptions provided remain appropriate for changing technologies, an evolving marketplace, and evolving business models.

Protection for **rights management information (RMI)** is also critical for enabling legitimate trade of copyrighted content in the digital marketplace. Like the USMCA, the Agreement should require adequate and effective protections for RMI.

The Agreement should incorporate the global consensus on the **term of protection** for works and sound recordings, which is consistent with current U.S. law. For works, this is a term of life of the author plus 70 years, or 95 years from date of publication for works not measured by the life of a natural person. For sound recordings, the term of protection under U.S. law is 95 years from fixation. The Agreement should provide at least a standard of protection commensurate with the USMCA, which requires a minimum term of protection of life of the author plus 70 years, or 75 years from publication for works and sound recordings. Kenya provides an outdated term of protection of life plus 50 or 50 years from creation or publication for works, and 50 years from creation for sound recordings. By adopting a term of protection in line with evolving global norms, Kenya would provide greater incentives for the production of copyrighted works and sound recordings. This change would also provide producers with a stronger incentive to invest in the local creative industries, which would spur economic growth and tax revenues, and enable producers to continue offering works and recordings to local consumers in the latest formats.

The Agreement must enshrine the concept that **limitations and exceptions** to copyright protection must be consistent with the longstanding “three-step test.” This touchstone of global copyright norms—which is found in the Berne Convention for the Protection of Literary and Artistic Works, the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement), the Treaties, and numerous other international agreements that include copyright obligations—is the well-established standard against which copyright exceptions and

limitations should be measured. Like every trade agreement into which the U.S. has ever entered, the USMCA appropriately provides a clean repetition of the three-step test to confine the scope of exceptions and limitations to copyright protection. In this Agreement, IIPA urges the inclusion of the text of the USMCA provision on copyright exceptions and limitations, and the omission of language on “balance” or “fair use.”

A clean repetition of the three-step test is critical to ensure that our FTA partners do not devalue the underlying exclusive rights that should be protected. As many Sub-Saharan Africa countries are in the midst of copyright reform efforts, a time-tested and broadly understood provision on limitations and exceptions to copyright protection is particularly important.⁴ The Agreement should reinforce this well-established global norm.

The Agreement should also include a provision that guarantees **freedom of contract** for transfers of exclusive rights. Freedom of contract is a key factor for the healthy growth of the entire creative sector because it permits rights holders to license and otherwise derive value from their copyrighted works and sound recordings.

2. Comprehensive Obligations for Copyright Enforcement

The Agreement should also incorporate strong obligations on enforcement, including: (i) **anti-camcording enforcement**—criminalizing the unauthorized camcording of movies in theaters; (ii) **presumptions of ownership**; and (iii) **criminal, civil, and border enforcement measures**. IIPA is hopeful that the Agreement will meet or exceed the very high standards that USMCA sets in these areas.

The Agreement should require **pre-established (statutory) damages** in civil cases as an alternative for rights holders in lieu of proving actual damages or lost profits. This is a critical enforcement tool because in many instances of copyright infringement, especially online, the harm to rights holders is substantial, but very difficult and expensive to quantify, often requiring experts. The Agreement should improve upon the USMCA provision by requiring such pre-established damages, whereas the USMCA provided that such a remedy was merely permissive, not mandatory.

Regarding **safe harbors for online service providers**, negotiators should not use the USMCA as a model. The USMCA included prescriptive provisions on safe harbors for online service providers that incorporated contentious issues into that agreement. Furthermore, the USMCA text on safe harbors includes several new provisions that do not appear to be consistent with U.S. law, and omits certain important conditions for safe harbor eligibility that are part of

⁴For example, South Africa is on the verge of enacting problematic copyright reform legislation that includes a broad spectrum of vaguely delineated exceptions to copyright protection that are clearly inconsistent with the requirements of the three-step test. Based on a petition by IIPA, the U.S. Trade Representative is currently undertaking a review of South Africa’s eligibility for benefits under the Generalized System of Preferences (GSP) focused, in part, on this problematic legislation. See IIPA Request for Review of the Intellectual Property Rights Practices of South Africa in the 2019 GSP Review, April 2019, available at <https://www.iipa.org/files/uploads/2020/03/SOUTH-AFRICA-IIPA-GSP-Post-Hearing-Brief.pdf>.

U.S. law.⁵ The proper interpretation and application of safe harbors is very complex with many different and strongly held views on all sides. The operation of the system for safe harbors in the United States is constantly changing due to rapid changes in technology, judicial evolution, and shifting business conditions. At the same time, increasing questions are being raised, in a variety of venues, about whether such detailed provisions, enacted over two decades ago, reflect current commercial realities and are “state of the art” in this complicated area. The U.S. Copyright Office, for instance, is currently preparing a report for Congress on the state of U.S. safe harbor law.

It is important that the Agreement does not limit Kenya’s ability to implement safe harbor provisions in a manner that will provide adequate and effective copyright protection and enforcement online. The USMCA approach resulted in an inflexible, unnecessarily detailed and prescriptive approach on safe harbors, which, as noted, fails to reflect the standards found in U.S. law. The Agreement offers an important opportunity to draft short and high-level principles that cover the U.S. system, and allow Kenya to implement best practices for today’s digital marketplace.

A granular approach to language on legal remedies and safe harbors is fraught and will make it impossible for negotiators to reflect the standards found in U.S. law. On this highly technical issue, therefore, these negotiations should take a general, high-level approach that articulates key principles, while providing flexibility. The Internet and online business models have changed dramatically even in the past few years, and will continue to change. The Agreement should reflect this reality.

The Agreement should explicitly incorporate **secondary liability principles**. By holding service providers responsible for infringements carried out by third parties using their services, secondary liability creates legal incentives for service providers to cooperate with copyright owners to address online infringement. In U.S. law, secondary liability doctrines (under vicarious, contributory, and inducement theories of law) provide legal incentives for cooperation, and are a deterrent to the unauthorized storage and transmission of copyrighted materials. Kenya must implement secondary liability principles to ensure adequate legal incentives for cooperation between service providers and rights holders. Unfortunately, not only is an explicit secondary liability standard missing in the text of the USMCA, the USMCA actually includes a number of

⁵For example, USMCA for the first time authorizes parties to “prescribe in its law conditions for ISPs to qualify” for safe harbors, or, “alternatively, shall provide for circumstances under which ISPs do not qualify” for safe harbors. This language could be interpreted, contrary to U.S. law, to allow parties to shift the burden such that, rather than requiring ISPs to affirmatively meet certain conditions to qualify for the safe harbor, parties may provide ISPs a blanket entitlement to a safe harbor, and the rights holders would have the burden of proving the ISP did not qualify. In addition, while prior FTAs required that safe harbors “shall be confined” to the four functions listed, USMCA does not explicitly include this limit. This raises the potential for parties to provide additional safe harbors for additional functions, which again would not be consistent with U.S. law. Footnote 118 regarding the “appropriate role for the government” also raises questions regarding consistency with the U.S. framework. Lastly, unlike prior FTAs, the USMCA does not include certain conditions for safe harbors that are part of U.S. law, including the requirement to publicly designate a representative to receive notifications, and, for eligibility for the caching safe harbor, the requirements to comply with industry standard technology or refreshing rules and to expeditiously remove or disable access to cached material upon notice that the original source of the material has been taken down.

new provisions that could undercut USTR's efforts to ensure U.S. trading partners provide adequate "legal incentives" through secondary liability principles.⁶

3. Collective Management

While direct licensing of copyright works and sound recordings by individual rights holders of their exclusive rights should always remain the baseline, in certain circumstances rights holders may prefer to exercise some of their rights on a collective basis, e.g., through CMOs. Public performance and broadcasting rights are a good example, because there are often a large number of users (potential licensees) involved, and the value of individual transactions may be relatively small compared to the transactional costs. Public performance income has become an increasingly important source of revenue for music rights holders worldwide, representing an important source of monies for the financing of the production and dissemination of new works. This importance has heightened the need for efficient, transparent, and accountable collective management services. It is therefore essential that rights holders can, on a voluntary basis, set up and govern their own CMOs. Governmental roles should be limited to establishing regulatory frameworks that enable efficient, fair and nondiscriminatory operations of CMOs backed by rights holders, and, where appropriate, providing expert fora for the resolution of disputes on certain aspects of collective management, including by ensuring that rights are properly valued.

Kenya's legal framework for CMOs falls well short of international standards and best practices. For example, rights holders are unable to voluntarily establish CMOs, nor do they have the right to withdraw. Moreover, government intervention has undermined rights holders' freedom to contract and control over their works and sound recordings. The rate-setting process for royalties is non-transparent, arbitrary, and unaccountable to rights holders. As a result, royalty rates are not set according to the commercial value of the use of the rights. Furthermore, there is considerable uncertainty regarding rights holders' share of revenues collected by CMOs, and there are also concerns regarding CMO governance.

The USMCA provision on collective management recognizes the important role of collective management and outlines best practices. This is significant and IIPA would welcome efforts to strengthen this provision in these negotiations. In addition, IIPA encourages the U.S. government to work intensively with the Government of Kenya to correct the extensive problems with CMOs described above, because strong rules on copyright protection and enforcement will be effectively negated if rights holders in Kenya are unable to control the use of their rights.

⁶For example, unlike in prior FTAs, the USMCA text on Legal Remedies and Safe Harbors includes an option to "take other action to deter the unauthorized storage and transmission of copyrighted materials." While the intent of this language is not clear, one interpretation is that it provides broad flexibility in additional measures Parties may choose to take to address online piracy and frame limitations on liability, undercutting the "legal incentives" obligation. The text also states that "the failure of an Internet Service Provider to qualify for the limitations in paragraph 1(b) does not itself result in liability," highlighting the absence of an explicit secondary liability obligation—many ISPs face no threat of liability without secondary liability concepts, meaning in that context that the conditions imposed on the safe harbors are essentially voluntary.

B. Digital Trade Objectives

As evidenced by the growth of and now reliance on revenues from digital distribution, the copyright industries have embraced all means of digital technologies to produce and distribute their works and recordings, including launching new businesses, services, and apps to meet evolving consumer demand. More legitimate copyrighted material is now available to consumers, and in more diversified ways and with more flexible pricing than at any time in history.⁷ This consumer appetite for copyrighted materials does not stop at our borders. To meet worldwide demand, the copyright sector, more than any other in the U.S. economy, has moved aggressively to digitally deliver its products and services across borders, inextricably linking “digital trade” with trade in copyright-protected material.⁸

As a result, the U.S. copyright industries, as much as any industry, depend on strong rules and practices for digital trade. The Agreement should therefore ensure a level playing field for American creative industries to compete in Kenya’s digital marketplace. In particular, the Agreement must address the single-most damaging barrier to digital trade faced by the creative industries: digital piracy. Content industries are forced to face unfair competition, including from those who engage in piracy as a high-profit, low risk enterprise. Today, legitimate businesses built on copyrighted content are facing increased threats, as they must compete with the massive proliferation of illegal services unencumbered by costs associated with either producing copyrighted works or obtaining rights to use them (as well as other services that avoid fair licensing and claim no legal responsibility for the copyrighted works distributed on their sites).

Digital piracy in Kenya is a growing problem. For example, a 2019 Muso and GumGum Sports study found that Kenya was among the top five countries in the world illegally streaming English Premier League (EPL) soccer games.⁹ Kenya’s local artists and producers are stymied by the negative impact of widespread piracy in the country, which has stunted its marketplace for creative content.¹⁰

⁷For example, there are now between 50 and 60 million licensed tracks on some of the major music streaming services. See e.g., <https://www.apple.com/au/applemusic/> and <https://www.amazon.com/music/unlimited> and hundreds of digital music services. For more information on the proliferation of services, see, <https://www.motionpictures.org/watch-it-legally/> (movies and television content); <http://www.whymusicmatters.com> and <http://www.pro-music.org/> (music), as well as the IFPI Global Music Report 2019.

⁸A January 2018 Department of Commerce study, using the latest available year (2016) data, found that charges for the use of intellectual property, which includes copyrighted content, accounted for \$124.5 billion of a total of \$403.5 billion of potentially ICT (information and communications technology)-enabled services exports, or 31%. It also found that charges for the use of intellectual property accounted for \$80 billion out of a total trade surplus of \$159.5 billion of potentially ICT-enabled services, or over 50%. See, Department of Commerce “Digital Trade in North America” at 4, available at: <https://www.commerce.gov/sites/commerce.gov/files/media/files/2018/digital-trade-in-north-america.pdf>.

⁹See Kariuki, James “Kenyans Lead in Illegal Streaming of EPL Matches,” July 11, 2019, [Daily Nation](https://allafrica.com/stories/201907120142.html), <https://allafrica.com/stories/201907120142.html>.

¹⁰ See, e.g., “DStv ‘Sambaza’ lowers pay for MultiChoice creatives,” October 30, 2019, [available at https://www.businessdailyafrica.com/corporate/companies/DStv-piracy-lowers-pay-for-MultiChoice/4003102-5330054-14kuv4bz/index.html](https://www.businessdailyafrica.com/corporate/companies/DStv-piracy-lowers-pay-for-MultiChoice/4003102-5330054-14kuv4bz/index.html) (MultiChoice Kenya, a television producer, states that infringement “has made it hard for us to pay our talents adequately at the prevailing market rate” and is “stifling the company’s ability to pump more investments into the Kenyan economy.”); Agade, Halligan “Film industry: How to get fans back into the cinema,”

The current size and scope of digital piracy worldwide, and its impact on the digital marketplace, is substantial, although the full costs of copyright piracy are difficult to quantify. RIAA estimated that in 2016 there were over 137.3 billion visits globally to websites dedicated to copyright infringements. A 2017 study “estimate[d] that the commercial value of digital piracy in film in 2015 was \$160 billion,” while the corresponding estimate for the music industry was \$29 billion. The study also spells out methodological reasons why “it is most likely that the value of total digital piracy exceeds our estimates by a considerable amount.”¹¹ This study does not include a comparable estimate for video games but discusses briefly how such an estimate might be prepared. The study also attempts to quantify the broader social and economic costs of piracy. A 2016 study by Carnegie Mellon focusing on movie piracy, determined that if piracy was eliminated in the theatrical window, box-office revenues would increase by 15% or \$1.3 billion per year.¹²

Rampant piracy not only impedes the evolution of legitimate channels for distribution, but also threatens to permanently damage or displace existing and authorized distribution channels, which are unable to compete with infringing business models that make pirated content available for free to consumers. Moreover, by undermining the U.S. copyright industries, piracy significantly impairs one of the key drivers of U.S. trade surplus. This is also true of other market distortions that prevent the commercial licensing of copyrighted materials or which hamper investment in the production and distribution of content (which often maximizes revenue through exclusive distribution deals). The Kenya negotiations must therefore address the problem of digital piracy, along with other impediments to the digital marketplace, including such market distortions arising from unfair competition, to enable the production and distribution of legitimate creative content in Kenya.

The legitimate online marketplace for creative content continues to expand and diversify. Today there are more than 450 legitimate online services around the world providing high-quality video-on-demand content to consumers. High-quality content drives the success of these platforms. The USMCA digital trade chapter achieved a series of important disciplines necessary to foster digital trade including precluding restrictions on localization barriers. Critically important, the USMCA also ensures non-discrimination of digital products and prohibits the assessment of duties on electronic transmissions. The inclusion of these important provisions in the Agreement, along with robust copyright provisions as outlined above, would help create the ecosystem necessary to establish new opportunities for legitimate digital dissemination of U.S. and Kenyan creative content.

IIPA is concerned that Article 19.18 on **Open Government Data** in the USMCA could diminish adequate and effective protection and enforcement of copyrights if implemented in an overly broad manner that sweeps copyrighted content into its directive for expanded access. If this

January 27, 2020, available at <https://africa.cgtn.com/2020/01/27/film-industry-how-to-get-fans-back-into-the-cinema/> (“Film producer Michael Mwangi says the big issue is piracy and unless authorities come up with radical measures then the already low numbers in the cinema halls will continue to nosedive.”)

¹¹Frontier Economics, *The Economic Impacts of Counterfeiting and Piracy*, February 2017, at pp. 23-39, available at <http://www.inta.org/Communications/Pages/Impact-Studies.aspx>.

¹²Ma, Liye and Montgomery, Aland and Smith, Michael D., *The Dual Impact of Movie Piracy on Box-Office Revenue: Cannibalization and Promotion*, Carnegie Mellon University (Feb 24, 2016) available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2736946.

provision is going to be replicated in whole or in part in the Agreement, the copyright industries should be consulted to avoid the concerns that resulted from the USMCA provision.

C. Market Access for Trade in Services and Protection for Foreign Investment

To best ensure a comprehensive scope and secure market access for evolving and future business models of the creative industries, the Agreement must follow the negative list format. It is of the utmost importance that the Agreement's investment chapter captures all forms of investment, including intellectual property. Similar to USMCA, this chapter should assure U.S. investors the opportunity to establish, acquire, and operate investments. The film and television industry believes that it is important that investors are provided national treatment and that investments are not constrained by performance requirements that mandate domestic content quotas. Quotas, like Kenya's broadcast quota, may promote the creation of a large amount of low-quality titles, but they do not promote sustained growth and development of the creative industries. The music industry believes it is important that that investments and consumer choice are not constrained by performance requirements that mandate the use of any particular repertoire or works. The Kenyan broadcast quota does not provide the right incentives for, or promote sustained growth and development of, the creative industries.

III. CONCLUSION

For the reasons set forth above, IIPA welcomes negotiations between the U.S. and Kenya. These negotiations offer the potential to produce a high standard trade agreement to improve copyright protection and enforcement and expand economic development in Kenya and Sub-Saharan Africa, and enable Kenya's consumers to enjoy a wide array of legally accessible copyrighted materials and services. The U.S. Government should embrace the unique opportunity to build on the USMCA, and correct its shortcomings, to achieve an agreement that will serve as a model for future U.S. trade agreements that contribute to increased U.S. jobs and trade competitiveness, and strengthen a critical driver of the U.S. trade surplus.

Respectfully submitted,



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